

## REMARKS

Applicants thank the Examiner for indicating that claims 4, 11 and 22 would be allowable if rewritten in independent form to include all limitations of any intervening claims.

Claims 1-25 are pending in the application. Claims 1, 10, 16, and 19 are independent. By the foregoing Amendment, claims 1, 4, 10, 16, 19, and 22 have been amended. These changes are believed to introduce no new matter and their entry is respectfully requested.

### Objection to Claims 1, 10, 16, and 19

In the Office Action, the Examiner objected to claims 1, 10, 16, and 19 citing informalities. By the foregoing Amendment, Applicants have amended claims 1, 10, 16, and 19 to accommodate the Examiner. Accordingly, Applicants respectfully request that the Examiner reconsider and remove the objection to claims 1, 10, 16, and 19.

### Rejection of Claims 4 and 22 Under 35 U.S.C. §112, Second Paragraph

In the Office Action, the Examiner rejected claims 4 and 22 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter that the applicant regards as the invention, citing informalities. By the foregoing Amendment, Applicants have amended claims 4 and 22 to accommodate the Examiner. Accordingly, Applicants respectfully request that the Examiner reconsider and remove the rejection to claims 4 and 22.

### Rejection of Claims 1-3, 5-10, 12-16, 19-21, and 23-25 Under 35 U.S.C. §102(e)

In the Office Action, the Examiner rejected claims 1-3, 5-10, 12-16, 19-21, and 23-25 under 35 U.S.C. §102(e) as being anticipated by U.S. Patent Publication No. 2004/0177087 to Wu et al. (hereinafter "*Wu*"). Applicants respectfully traverse the rejection.

A claim is anticipated only if each and every element of the claim is found, either expressly or inherently, in a reference. (MPEP §2131 *citing Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628 (Fed. Cir. 1987)). The identical invention must be shown in as

complete detail as is contained in the claim. *Id. citing Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236 (Fed. Cir. 1989)). The elements must be arranged as required by the claim. *In re Bond*, 910 F.2d 831, 15 USPQ2d 1566 (Fed. Cir. 1990).

Representative claim 1 recites in pertinent part “receiving an allowed amount of target traffic representing a first value and second value representing a time interval during which to receive the allowed amount of target traffic, the first value and the second value defining a percentage of target traffic allowed through a port, *the port having a port speed*; and *determining that port speed changed* by a factor of  $N$ ; scaling the second value by a factor of  $1/N$ , respectively; and based on the allowed amount of target traffic and the scaled second value, dropping target traffic when a percentage of target traffic exceeds the defined percentage of target traffic allowed through the port” (emphasis added). Independent claims 10, 16, and 19 recite similar language.

In the Office Action, the Examiner states that *Wu* discloses receiving a first value representing an allowed amount of target traffic and second value representing a time interval during which to receive the allowed amount of target traffic, the first value and the second value defining a percentage of target traffic allowed through a port, the port having a port speed; and determining that port speed changed by a factor of  $N$ ; scaling the second value by a factor of  $1/N$ , respectively; and based on the allowed amount of target traffic and the scaled second value, dropping target traffic when a percentage of target traffic [exceeds the defined percentage of target traffic allowed through the port]. Applicants respectfully disagree.

Applicants respectfully submit that *Wu* fails to disclose “determining that port speed changed” as recited in the claims. This is because *Wu* is not concerned with changing port speed. *Wu* appears to be concerned with how to deal with congestion caused by packets of a lower classification to the detriment of packets of a higher classification. The port speeds in *Wu* do not change.

Applicants respectfully submit further that *Wu* fails to disclose scaling of a time interval during which to receive an allowed amount of target traffic. The Examiner cites paragraph [0038]

of *Wu* for this proposition. Applicants respectfully disagree. Applicants respectfully submit that the “weighting” in *Wu* refers to determining a transmit order for queued packets. The “weighting” in *Wu* does not refer to scaling a time during which to receive an allowed amount of target traffic.

Applicants respectfully submit that Applicants only need to demonstrate that one element of the claimed invention is missing to establish that the Examiner has not met the initial burden of making a *prima facie* case of anticipation with respect to the claimed invention. Applicants have shown that at least two elements are not taught either expressly or inherently in *Wu*. Applicants respectfully submit therefore that because the Examiner has failed to show that *Wu* teaches the identical invention as recited in the claimed invention, the Examiner has failed to meet the burden of establishing a *prima facie* case of anticipation of the claimed invention over *Wu*. Accordingly, Applicants respectfully request that the Examiner reconsider and remove the rejection.

#### Rejection of Claims 17-18 Under 35 U.S.C. §103(a)

In the Office Action, the Examiner rejected claims 17-18 under 35 U.S.C. §103(a) as being obvious over *Wu* in view of U.S. Patent No. 5,991,271 to Jones et al. (hereinafter “*Jones*”). Applicants respectfully traverse the rejection.

To establish a *prima facie* case of obviousness, the Examiner must show that the cited references teach each and every element of the claimed invention. (MPEP §2143.) *citing In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)). A patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was independently known in the prior art. *KSR Int’l C. v. Teleflex, Inc.*, No 04-1350 (U.S. Apr. 30, 2007). If a combination or modification to a reference is used, an Examiner must show that there is some expectation of success that the combination or modification proffered would predictably result in the claimed invention. Obviousness is a question of law based on underlying factual inquiries. The factual inquiries enunciated by the U.S. Supreme Court in *KSR* include the *Graham* factors of determining the scope and content of the prior art, ascertaining the differences between the claimed invention and the prior art, and resolving the level of ordinary skill in the pertinent art.

Once the *Graham* factual inquiries are resolved, the Examiner must explain why the difference(s) between the cited references and the claimed invention would have been obvious to one of ordinary skill in the art. The rationale used must be a permissible rationale. The USPTO promulgated Examination Guidelines for Determining Obviousness in View of *KSR* in the Federal Register, Vol. 72, No. 195 (October 10, 2007). These *KSR* Guidelines enumerate permissible rationales and the findings of fact that must be made under the particular rationale.

Claims 17-18 properly depend from claim 16 and are thus patentable for at least the same reasons that claim 16 is patentable. (MPEP §2143.03 (citing *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988))). Accordingly, Applicant respectfully requests that the Examiner reconsider and remove the rejection to claims 17-18.

### CONCLUSION

Applicants respectfully submit that all grounds for rejection have been properly traversed, accommodated, or rendered moot and that the application is now in condition for allowance. The Examiner is invited to telephone the undersigned representative if the Examiner believes that an interview might be useful for any reason.

Respectfully submitted,

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1/29/2008  
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